by the United States Court of Appeals for the Fourth Circuit on January 4, 1966. That Honorable Court reversed and remanded the case on April 4, 1966.

When Petitioners appeared before the District Court they ignored the well settled law that the complaint becomes the record as to the facts and is an admission of the allegations of the complaint.[1] They persuaded the District Court to go outside the record to find material facts. As a result, the Court was able to find or infer that there were "distributors" between the parties to this suit. With this erroneous foundation the Petitioners succeeded in establishing that the respondents had no standing with which to sue. They are again attempting to raise this Hydra head. Plaintiff-Respondents are entitled to a trial to determine if these intermediaries, if there be any, absorb or "pass on" the impact of a conspiracy. There is a direct bearing upon the question of standing to sue under Section 4 of the Clayton Act.

The Respondents properly relied on the above argument and successfully contended that milk they sold was the same product distributed by the Petitioners; that the conspiracy was aimed at them; that they were in the target area of the conspiracy; that the damages had been passed on to them and that it was most improper to render a Summary Judgment to deny them their day in court.

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[1] "* * * the motions to dismiss must be deemed to admit all of the above as true, we need only consider whether or not these facts would establish a violation of Section 1 of the Sherman Act * * *." *U. S. v. New Wrinkle, Inc.* 342 U. S. 371.

In *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.* 185 F. (2d) 196 (9th Cir. 1950-1951) CCH Trade Cases 62, 714, Cert. Denied 340 U. S. 943 (951); Rehearing denied, 341 U. S. 912 (1951) the Court said:

"Appellants' next contention is that appellees, by filing their motions, admitted all of the well-pleaded allegations of fact in the complaint, and that the affidavits filed by appellees in support of the motion cannot be used to contradict such allegations in the complaint. Generally speaking, this is a correct statement of the law."

The District Court erred in regarding the fluid milk sold by defendants as a manufactured product different from the one produced by plaintiffs.

The Court holds:

> "* * * The plaintiffs and the defendants handle different products—the plaintiffs produce raw milk; the defendants use this ingredient as the major ingredient in the manufacture of pasteurized, homogenized, Vitamin D fortified, Grade A, Class 1, packaged milk."

On the basis of this error the Court concludes that plaintiffs are "suppliers" of raw materials to manufacturers; that under a legal doctrine relied upon, namely, the rule excluding suppliers in the *Snow Crest case* (*Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956), are precluded from suing because they are "suppliers".

The fluid milk sold by defendants is not manufactured. It is the same milk that comes from the cow and that plaintiffs produce and sell. Processing does not constitute manufacturing as the District Court assumes. Manufacturing is the making of a product, *i.e.*, bringing the product into existence. The cow manufactures milk. The processor homogenizes, pasteurizes and fortifies it.

Milk is defined to be the cow's lacteal secretion containing a certain percentage of milk solids-not-fat and certain percentage of milkfat. Homogenized milk is defined as milk which has been treated to insure a required breakup of the fat globules. Pasteurized milk is milk which has been heated to a certain temperature for a certain time in order to kill certain bacteria.[2]

Processing of milk does not change the basic nature of milk or create a new product. Processing affects the

[2] Grade A Pasteurized Milk Ordinance: 1965 Recommendation U. S. Public Health Service, Department of Health, Education and Welfare.

quality and safety of the product, not the nature of the fat and solid content. Processing would be an unncessary step in the sale of milk if the federal and state governments did not require the step of pasteurization for the health of the people.

In antitrust cases, the Supreme Court is slow to find that a basic product loses its identity in processing.

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219 (1947), the Supreme Court held that extracting the sugar content of beets to make raw sugar was not a manufacturing process in the usual sense of that term and that refined sugar and raw sugar produced by growers in the form of sugar beets were not different products. Defendants contended that plaintiffs were suppliers of raw materials and had no standing to sue. The Supreme Court said:

> "To compare an industry so completely interlocked in all its stages, by all-inclusive contract as well as by industrial structure and organization, with one like producing, processing, and marketing fruits, vegetables, corn, or other products, susceptible of various uses and under conditions affording varied outlets for market, both local and interstate, in the raw or refined state, in which neither such a contractual nor such an industrial integration exists, is to ignore the facts of industrial life. So is it also to make conclusive comparisons with other industries in which the manufacturing process requires and has available a greater variety of raw materials for making the finished product, and involves a longer and more extensive process of change, than does extracting the sugar content of beets to make raw sugar."

Obviously, milk undergoes far less change in being pasteurized or homogenized than do sugar beets in being refined into granulated sugar.

In a recent case involving milk, *Foremost Dairies, Inc. v. Federal Trade Commission,* ..... F. (2d) ..... (5th Cir., July 14, 1965), in sustaining the Commission's charges under Section 2(a) of the Robinson-Patman Act, 15 U. S. C., Section 13(a), that Foremost had granted advantageous prices by way of a 5% discount to a certain retail grocery chain in Albuquerque, N. M., which advantages had not been granted to any of its independent grocer customers in that area, the Court in passing on the question of interstate commerce discussed the manner in which the milk is shipped to and handled at Foremost's plant, as follows:

> "Ordinarily, Foremost purchases its supply of raw milk from associations of dairymen, and it is shipped to the Foremost processing plant in Santa Fe, New Mexico. There it is unloaded from the trucks, tested, standardized to a uniform butterfat content by the addition of other milk of a pre-determined butterfat ratio, pasteurized, in some cases homogenized, and bottled."

In referring to this handling, the Court later said the milk "underwent a rather negligible processing operation which did not change its character appreciably to the shelves of retail grocery establishments in Albuquerque." In the appended footnote 6, the Court said:

> "Petitioner relies upon a number of cases in which raw materials used in the manufacture of a product had moved across the state lines although all the sales in question were made in the same state in which the ultimate product was manufactured. See *Central Ice Cream Co. v. Golden Rod Ice Cream Co.,* 287 F. (2d) 265 (7th Cir.), cert. denied, 368 U. S. 829 (1961); *Brosious v. Pepsi-Cola Co.,* 155 F. (2d) 99 (3rd Cir. 1946); *Ewing-Von Allmen Dairy Co. v. C. & C. Ice Cream Co.,* 109 F. (2d) 898 (6th Cir. 1940). In contradistinction to these cases, the raw milk which arrived each day from outside New Mexico was not altered material-

ly by the processing in Santa Fe, and the milk was not warehoused for any appreciable length of time before shipment. We feel this serves as an adequate distinction between these cases and the instant one."

The Court in further emphasis of the point that the so-called processing of milk does not make a significant change in the basic product, said:

"In the case before us, the fluid milk undergoes a rather negligible processing,[8] in general moving in a constant flow from the Colorado Dairy farms to meet the fairly predictable demands of the retail grocers in Albuquerque."

In footnote 8, the Court further emphasizes the point:

"The term 'processing', as used in section 2(e), has been defined as 'a mode of treatment of materials to be transformed or reduced to a different state or thing.' *Corn Prods. Ref. Co. v. FTC,* 324 U. S. 726, 744, 89 L. Ed. 1320, 1335 (1945). We do not have that degree of product transformation in the instant case."

It is clear then that in so far as the District Court's opinion in the case at bar rested upon his finding that producers and defendants handle different products, it was in error. The Court of Appeals also apparently thought so.

The Court of Appeals in the *Foremost case, supra,* also makes a very pertinent comment on the subject of competitive injury under the antitrust laws holding that general injury to competitive conditions affords an aggrieved party the basis for an action in damages. The Court said:

"'• • • The probability of a general injury to competitive conditions in the market in which the seller or the purchaser sells his product will support a cease and desist order or afford an aggrieved party the basis for an action in damages."

• • •

The Fourth Circuit differentiated the *Volasco Products Co. v. Lloyd A. Fry Roofing Company*, 308 F. (2d) 383 (6 Cir., 1962), *certiorari* denied, 372 U. S. 907 (1963) case, reversing the District Court. They noted that both arguments raised by the Petitioners—absence of competition and relationship between the parties—have been authoritatively spiked, quoting extensively from *Karseal Corp. v. Richfield Oil Corp.*, 221 F. (2d) 358 (9 Cir. 1955) as we do in our argument below.

REASONS FOR NOT GRANTING THE WRIT

Whether *South Carolina Council;* infra, and *Volasco,* supra, are or are not irreconcilable is not the issue. An injured party has standing to sue if he is in the "target area" of the antitrust violation.

This rule was thoroughly explained and applied in the *Karseal case* (*Karseal Corp. v. Richfield Oil Corp.*, 221 F. (2d) 358 (1955). In that case Karseal was allowed to recover from Richfield Oil because Richfield had foreclosed Karseal's distributors from selling to Richfield stations even though Karseal's distributors were independent distributors.

Because of the similarity of questions in that case and this, it is appropriate to quote from that decision at some length. There the Court said:

> "• • • The precise question presented is whether Karseal's business and wax product is 'within that area of the economy which is endangered by a break-down of competitive conditions in a particular industry.' *Conference of Studio Unions v. Loew's Inc.*, 193 F. (2d) 51 (9th Cir. 1951), 1950-1951 CCH Trade Cases, 2,6953. Or in other words, was Karseal within the 'target area' of Richfield's illegal practices, determined in the *Richfield case?* Assuming Karseal was 'hit' by the effect of the Richfield antitrust violations, was Karseal 'aimed

at' with enough precision to entitle it to maintain a treble damage suit under the Clayton Act?

"The action is brought by Karseal, who it is alleged, was the manufacturer of a wax, selling to independent distributors, who in turn were prevented or impeded in selling it to the 2,965 independent Richfield service stations by reason of Richfield's illegal practices in violation of the antitrust laws. No cause of action is presented in behalf of the independent distributors of Karseal wax. None are parties plaintiff."

"* * * Richfield relies on an absence of proximate cause and directness of injury from the facts pleaded. In a private antitrust suit, the plaintiff must not only allege a violation of the antitrust laws, but damage to the plaintiff proximately resulting from the acts and conduct which constitute the violation. *Feddersen Motors v. Ward,* 180 F. (2d) 519, 522 (10th Cir. 1950), 1950-1951 CCH Trade Cases 62,579; *Clark Oil Co. v. Phillips Petroleum Co.,* 148 F. (2d) 580, 582 (8th Cir., 1945), 1944-1945 CCH Trade Cases 57,358; cert. denied, 326 U. S. 734; *Northwestern Oil Co. v. Socony-Vacuum Oil Co.* (*supra*); *Glenn Coal Co. v. Dickinson Fuel Co.,* 72 F. (2d) 885, 887 (4th Cir. 1934); *Myers v. Shell Oil Co.,* 96 F. Supp. 670, 674 (S. D. Cal. 1951, CCH Trade Cases 62, 816.

"The treble damage action is one for a tort and punitive and compensatory damage is the relief granted. 'Under the Clayton Act the right is not confined to persons in privity with the wrongdoer, but is given to anyone who has suffered injury to his business or property by reason of the wrongful acts.' *Clark Oil Co. v. Phillips Petroleum Co.* (*supra*), p. 582-3. *Vines v. General Outdoor Advertising Co.,* 171 F. (2d) 487, 491 (2nd Cir., 1948), 1948-1949 Trade Cases 62,340 (Footnote omitted.)"

"This Court has squarely stated the rule, and its reverse side, in *Conference of Sutdio Unions v. Loew's Inc.* (*supra*), at p. 54:

"* * * A conspiracy may have many purposes and objects; the conspirators may perform an almost in-

finite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured "by reason" of anything forbidden in the anti-trust laws.

'Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm'."

"Giving full value to the allegations of the amended complaint (as we must) what was Richfield's violation? It applied the illegal restraint at the level of the independent service stations. The restraint was directed against the particular products in their finished form (including Karseal's wax), described in the findings, conclusions and decree of the *Richfield case,* and not against raw materials or component parts of the products.

"Primarily the operation and effect of the illegal practices was on the products (including Karseal's wax) which were competitive to the Richfield sponsored products. The impact was on the market. The gist of the violation was the prevention or impeding of the sale of these competitive products. Logically, and as found in the findings and conclusions of the trial judge in the *Richfield case,* the illegal acts were directed against the mnufacturers and distributors of the competing products, including Karseal's wax. Such persons and such products were the 'target' of the illegal practices.

"Apparently, Richfield's argument is in part, that the independent distributors of Karseal's Wax might

> have a cause of action, but that Karseal is once removed from the distributors and therefore may not sue. We need not pass on whether such distributors have a cause of action. But it would appear that both the manufacturer and the independent distributor have such a cause of action."

Only by drawing inferences in contravention of the rules on motions to dismiss and reaching erroneous conclusions as hereinbefore stated, did the District Court find the rule in *Snow Crest* or *Volasco* applicable here. Patently the rule in *Karseal* should have governed and as there, the motions to dismiss should have been denied.

The District Court has laid too much stress on technicalities in deciding upon plaintiff's right to sue. The Supreme Court said in the *Mandeville case, supra:*

> "The statute does not confine its protection to consumers or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150; *American Tobacco Co. v. United States,* 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. *United States v. South-Eastern Underwriters Assn., supra,* at 553. [322 U. S. 533 (1944)]"

While the District Court states that there is an "excellent and thorough discussion of standing to sue in Vol. 64, Columbia Law Review 578 (1964) from which this Court has paraphrased generally," it does not appear that the lower court was persuaded or influenced by the article.

The Court of Appeals apparently was for they understood that the theme of the Columbia Law Review article is that Section 4 of the Clayton Act is broad and only those seeking windfalls or who are well beyond the protection of tort law should be barred. The next to last paragraph in the

article is of particular interest here where the District Court has denied standing to sue to milk producers in the State of South Carolina on a *per se* basis, it having been admitted that plaintiffs were injured. The paragraph reads as follows:

> "It is not contended that standing requirements should be ignored, or that the courts should be open to all regardless of the obvious absurdity of their claims. The courts should, however, avoid summary dismissal on purely verbal grounds. The suggested approach could mitigate the present tendency to erect *per se* rules that arbitrarily deny standing to certain classes of plaintiffs; courts would be compelled to investigate each individual fact situation. The area of potential liability would not be as broad as might be feared. A plaintiff would still be required to establish that he suffered damage to a protectable interest and that such damage was in fact caused by the violation. It should always be remembered that the plaintiff is an innocent party; that he should suffer to spare the wrongdoer is highly questionable."

Petitioners claim that the doors would fly open is absurd. Many Courts have expressly used the "target area" principle: *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 298 F. (2d) 356, 359 (6th Cir. 1961); *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F. (2d) 678, 679 (2d) (Cir. 1955), cert. denied, 350 U. S. 936 (1956); *Conference of Studio Unions v. Loew's Inc. (supra); Schwartz v. Broadcasting Music, Inc.*, 180 F. Supp. 322 (S.D.N.Y. 1959) (some of plaintiff's claims fell inside, some outside the "target area"); *Affiliated Music Enterprise, Inc. v. Seasac, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958, aff'd, 268 F. (2d) 13 (2d Cir.), cert. denied 361 U. S. 831 (1959).

In the *Schwartz case (supra)*, the Court held that a composer of music had standing to sue for treble damages for failure of Broadcast Music, Inc. to exploit his com-

position even though the composer had contracted with an intermediary and the intermediary had received compensation from the defendants which kept it whole. The Court held that the intermediary was removed from the "target area" by being kept whole and therefore the composer was directly in the line of fire. The fact that there was no privity between plaintiffs and defendants was not controlling. The composer was in the target area of defendant's violation.

In *Bolick-Gilman Co. v. Continental Baking Co., supra,* the Circuit Court reversed the District Court who had dismissed the complaint on the grounds that a Las Vegas distributor of baked goods who had been forced out of business because he was unable to meet the discriminatory prices set by Continental Baking Company through its distributor in Las Vegas had no standing to sue, saying:

> "Appellee asserts that no causal connection is shown between the acts of defendant and the fact that plaintiff was put out of business. It may also be said that other allegations of the complaint serve to obscure such causal connection and to render unclear the purpose of defendant in its alleged discrimination and agreement."
>
> "It cannot be said, however, that it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson* (*supra*). Dismissal of the action upon this pleading was not warranted. See *II Moore, Federal Practice,* Section 1218 (2d Edition, 1948)."
>
> "Reversed and remanded with instructions that the order dismissing the complaint with prejudice be set aside and for further proceedings."

The writer of an article entitled "The 'Injury' and 'Causation' Elements of a Treble-Damage Antitrust Action" (Earl E. Pollock) in Northwestern University Law Review, Vol. 57, No. 6 Jan.-Feb., 1963, under the heading "Some Conclusions and Reflections" makes some very interesting

observations regarding the "target area" doctrine as follows:

> "Some Conclusions and Reflections
>
> "If 'a line must be drawn' * * * and even the *Congress* (*infra*) *case* shows there is no alternative * * * the 'target area' principle offers a more realistic basis for drawing it.
>
> First of all, virtually all federal courts have already accepted the principle, implicitly if not in name; and the doctrine of the *Congress* (*infra*) *case* would seem to be limited to its rather special fact situation.
>
> Second, not only is the principle deeply rooted in the history of the private antitrust action, but it also has certain parallels in general tort law. For example, although based on the negligence concept of 'duty,' Judge Cardozo's *Palsgraf* decision is virtually articulated in 'target area' terms.[3]
>
> Third, although judges may occasionally differ as to who is in the 'target area' of certain types of violations, the 'target area' principle provides the courts with a comprehensive and reasonable objective criterion for application in novel situations. The alternative, except where the law is settled, is to sustain or reject liability on a case-by-case basis according to frequently submerged predilections.
>
> Fourth, the 'target area' principle focuses attention on the relationship between the claimed loss and the purpose of the alleged misconduct. To this extent, it provides a tool for injecting something like the negligence 'duty' concept into antitrust, and it helps shape the treble damage 'punishment' to fit the particular crime.
>
> *Palsgraf v. Long Island R. R.*, 248 N. Y. 339, 341-42, 162 N. E. 99, 99-100 (1928). See also *Robins*

[3] The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. . . . Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.' . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

Dry Dock & Repair Co. v. Flint, 275 U. S. 303, 309 (1927) (*per* Holmes, J.).

Fifth, and perhaps most important, the 'target area' principle gives more meaningful content to the concept of 'direct injury'; it makes explicit the policy nature of the problem and lifts it out of the morass of 'proximateness', 'remoteness' and similar cliches; and as a result it aids rather than obscures analysis.

Despite the dire predictions made at its birth, the private antitrust action has proven itself to be anything but 'a wasp without a sting.' At the risk of making a prediction myself, I suggest that the future effectiveness of the remedy would be strengthened—rather than weakened—through a clarification of the 'injury' and 'causation' requirements, a greater awareness of their elusive quality, and use of a more straightforward approach in their application."

In the case of *Congress Building Corporation v. Loews, Inc.*, 246 F. (2d) 587, the plaintiff owned a theatre building which he leased to one who conspired with others. The rental of the building was based on a percentage of the gross receipts of the theatre. The conspiracy caused a decrease in receipts and thus in the rental under the lease. The court held the conspiracy was clearly the direct and proximate cause of plaintiffs' loss. Here that the price received by plaintiffs who sell to processors is directly tied to the retail price received by the processors is specifically alleged in the complaint. Producers' prices fluctuate with fluctuations in wholesale prices received by processors. As already seen, milk sold at retail is essentially the same product as that delivered by the plaintiff producers. Processors only treat the milk; they do not convert it into another product. The plaintiffs are the parties certain to be "hit" by the acts of defendants. Plaintiffs are in the "target area" of the conspiracy. They are within "that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."

If plaintiffs cannot sue, no one can sue and the antitrust laws would be frustrated.

• • •

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be denied.

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